

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE

NEW VISTA NURSING AND  
REHABILITATION, LLC

and

Case No. 22-CA-29845

1199 SEIU UNITED HEALTHCARE  
WORKERS EAST, NJ REGION

*Lisa Pollack, Esq.*, Newark, NJ  
for the Acting General Counsel  
*Morris Tuchman, Esq.*, (*Law Offices of Morris Tuchman*),  
New York, NY for the Respondent  
*William S. Massey, Esq.*, (*Gladstein, Reif &*  
*Meginniss, LLP*), New York, NY for the Charging Party

DECISION

Statement of the Case

Mindy E. Landow, Administrative Law Judge. Upon charges and amended charges filed on February 11, March 2 and March 15, 2011<sup>1</sup> by 1199 SEIU United Healthcare Workers East, NJ Region (the Union), on April 28 the Regional Director, Region 22 issued a Complaint and Notice of Hearing (the complaint) alleging that New Vista Nursing and Rehabilitation, LLC (New Vista or Respondent) violated Section 8(a)(1) of the Act by: interrogating employees about their union activities and sympathies; creating an impression among employees that their union activities were under surveillance; soliciting employee grievances and promising employees increased wages, benefits and improved terms and conditions of employment if they refrained from union organizational activities and if they refrained from seeking union representation. The complaint further alleges that Respondent violated Section 8(a)(1) and (3) of the Act by altering the duties of its licensed practical nurses (LPNs) by requiring them to complete employee evaluations of, monitor the performance of and discipline its certified nursing assistants (CNAs) in order to convert the LPNs into supervisors within the meaning of the Act so as to prevent them from obtaining Union representation. Respondent filed an answer in which it denied the material allegations of the complaint. This matter was tried before me in Newark, New Jersey on July 28.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for the Acting General Counsel <sup>2</sup> and the

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<sup>1</sup> Unless otherwise indicated, all dates are in 2011.

<sup>2</sup> Also referred to herein as the General Counsel.

Respondent I make the following

## Findings of Fact

### 5 I. Jurisdiction

Respondent is a New Jersey corporation with an office and place of business located in Newark, New Jersey, where it is engaged in the operation of a nursing home and rehabilitation center. During the twelve-month period preceding the issuance of the complaint, Respondent  
 10 derived gross revenues in excess of \$100,000 and purchased and caused to be delivered to its Newark, New Jersey facility goods and supplies valued in excess of \$50,000 directly from suppliers located outside the state of New Jersey. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### 15 II. Alleged Unfair Labor Practices

A. The underlying representation case and subsequent determination as to the asserted supervisory status of LPNs

20 The Union has been the collective-bargaining representative of certain employees of Respondent including the CNAs and housekeeping and dietary employees. Recently, the Employer also agreed to recognize the 4 or 5 cooks who work at the facility. After an organizational campaign among the LPNs, on January 25 the Union filed a representation  
 25 petition in Case No. 22-RC-13204 seeking an election the following unit:

All full-time and regular part-time Licensed Practical Nurses employed by the Employer at its Newark, New Jersey facility, excluding all other employees, guards, and supervisors as defined in the Act.

30 There was a pre-election hearing conducted over the course of several days in February where Respondent argued and presented evidence in support of its contention that the petitioned-for unit was inappropriate because all of the LPNs were supervisors within the meaning of Section 2(11) of the Act. Thereafter, on March 9, the Regional Director for Region  
 35 22 issued a Decision and Direction of Election rejecting the argument that the LPNs were supervisors. In doing so, the Regional Director noted, among other things, that the LPNs had never been evaluated on their ability to monitor the work of or discipline the CNAs. On March 23, the Respondent filed a request for review of the Regional Director's Decision and Direction of Election which was denied by the Board on April 8.

40 Following the representation election held on April 8, the Union was certified as the exclusive collective-bargaining representative of the employees in the above-described unit. About May 3, the Union by letter requested that the Respondent recognize and bargain collectively with it as the exclusive collective bargaining representative of the unit and to provide  
 45 the Union with specific information. On May 13, the Respondent sent an email to the Union stating that it would not bargain and that it was testing the Union's certification. Thereafter, pursuant to a charge filed by the Union on May 13, the Acting General Counsel issued a complaint on May 19, alleging that Respondent had violated Section 8(a)(5) and (1) of the Act by refusing the Union's requests to bargain and to furnish necessary and relevant information  
 50 following the Union's certification. The Respondent filed an answer admitting in part and denying in part the allegations in the complaint and contested the validity of the certification on the basis that the unit was inappropriate.

On June 9, the Acting General Counsel filed a Motion for Summary Judgment and a Memorandum in support thereof. On June 10, the Board issued a Notice to Show Cause why the Motion should not be granted. Respondent filed a response asserting that a hearing was warranted.

On August 26, after the hearing in the instant matter was held, the Board issued a decision in *New Vista Nursing and Rehabilitation, LLC*, 357 NLRB No. 69 (2011),<sup>3</sup> granting the Acting General Counsel's Motion for Summary Judgment, certifying the bargaining unit and finding that Respondent had failed and refused to provide information to and to bargain with the Union. The Board ordered the Respondent to bargain with the Union as the collective-bargaining representative of the unit and directed, among other things, that the initial period of the Union's certification as bargaining representative begin to run on the date that Respondent begins to bargain in good faith with the Union.

As the Board noted in the above-referenced decision, in its response to the General Counsel's Motion for Summary Judgment, Respondent had contended that the duties of the LPNs had been changed on March 25, at a point in time after Respondent filed its request for review of the Regional Director's finding that the LPNs were not statutory supervisors but prior to the Board's denial of review of that finding. The Respondent asserted that on that date the LPNs were given supervisory authority over the CNAs and that this change would require the Regional Director to reach a different result regarding their supervisory status and the appropriateness of the unit.<sup>4</sup>

In granting the General Counsel's Motion for Summary Judgment, the Board addressed Respondent's contentions regarding the asserted new duties of the LPNs as follows:

The Respondent's attempt to raise alleged changes to the LPNs duties in this proceeding is procedurally improper. As indicated, the alleged changes occurred *before* the Board denied the Respondent's request for review of the Regional Director's finding that the LPNs were not supervisors. Although the Respondent's request for review had already been filed, it could have filed a motion to reopen the record. The Respondent did not file such a motion, however, or make any other effort to bring the alleged changes to the Board's attention. Thus, the Respondent is improperly attempting to raise an issue that could have been litigated in the representation proceeding.

*New Vista Nursing and Rehabilitation*, supra, slip op. at 2 (emphasis in original; citations

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<sup>3</sup> I take administrative notice of this Decision and the Board's findings therein.

<sup>4</sup> In particular, the submission sent to the Board by Respondent's counsel asserted: "The request for review in the representation case was dated March 23, 2011, *before* the alleged change took place. It, therefore, dealt only with the facts extant at that time. The events of March 25, 2011, however, could and likely did, change the finding that the LPNs were not supervisors. Surely an employer, where there is no allegation of improper motive, may structure their company as they see fit. In this case[,] the facility *after a Regional Director's decision that the LPNs were not supervisors* that it had appealed, decided to make certain that its business model and will; that its LPNs be supervisors, be effected. After all, a company cannot be expected to permanently run its company without its LPN supervisors merely because at some point in the past, they were found to be wanting in supervisory indicia. The employer clearly could then make clear beyond peradventure that the LPNs *are* supervisors by specifically assuring that they have supervisory indicia thereafter. So long as they have statutory supervisory authority, they would be statutory supervisors" (emphasis in original).

omitted).<sup>5</sup>

B. Respondent's operations

5 The Employer operates a 340-bed nursing and sub-acute care facility in Newark, New Jersey. Administrator Newt Weinberger oversees the facility. Victoria Alfeche (also referred to in the record as Vicky) is the Director of Nursing (DON). As is set forth in the Decision and Direction of Election, reporting to Alfeche are two nursing supervisors, one working during the evening and the other the overnight shift during which time they supervise the entire facility. Residents are housed on three floors of the facility and each residential floor is divided into east and west units. The facility employs both LPNs and registered nurses (RNs). When working in the capacity of floor nurse, the LPNs and RNs perform substantially similar functions. In addition to the approximately 38 LPNs, Respondent employs about 150 CNAs and 17 RNs who function as floor nurses. In addition, as Weinberger testified in the instant hearing, there are "four additional RNs that do oversight of the MDSs and stuff like that." (The issue of the MDS reporting requirement is discussed in further detail below).

One nurse and 4 or 5 CNAs are assigned to each unit. There are also unit managers assigned to each floor. The facility operates with three shifts of employees. The day shift runs from 7:00 a.m. to 3:00 p.m.; the evening shift is from 3:00 p.m. to 11:00 p.m. and the overnight shift is from 11:00 p.m. to 7:00 a.m.

The testimony of the LPNs at this hearing was to the effect that RNs are authorized to "write up" LPNs for infractions. The evidence is unclear, however, as to whether this is limited to instances of sub-standard patient care or extends to other personnel practices and procedures. At the instant hearing, the General Counsel took the position, in concurrence with the

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<sup>5</sup> In its post-hearing brief, Respondent appears to suggest that I rely upon the underlying representation case transcript, which was entered into evidence here, and reconsider the issue of the supervisory status of the LPNs. In this regard, Respondent relies upon *JAMCO*, 29 NLRB 896, 899 (1989) and *Bon Harbor Nursing & Rehabilitation Center*, 348 NLRB 1062 (2006), as standing for the proposition that a determination in a representation case that an individual is not a supervisor is not binding in a subsequent unfair labor practice proceeding involving independent violations of Section 8(a)(1) of the Act. However the authority relied upon by Respondent is inapposite to the situation here. Those cases involve situations calling into question the supervisory status of a particular individual or individuals which has become material in a subsequent unfair labor practice case involving the employer's responsibility for alleged unfair labor practices. Such circumstances are qualitatively and substantively different from the situation presented here, where the supervisory issue was not collateral, but central to the issues litigated in the underlying representation case and which called into question the appropriateness of the unit in its entirety. Section 102.67(f) of the Board's Rules and Regulations precludes relitigating "in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding." As that provision also provides: "Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding." The Board has stated that "[s]ubsequent unfair labor practice cases related to prior representation proceedings include not only Section 8(a)(5) refusal-to-bargain cases where there is a test of certification, but also in appropriate circumstances, unfair labor practice cases that arise under other sections of the Act." *Hafadai Beach Hotel*, 321 NLRB 116, 117 (1996). See also *Cutter of Maui, Inc.*, 344 NLRB 1197 (1995); *Verland Foundation*, 296 NLRN 442, 443 (1989). I find that such "appropriate circumstances" are present here. Moreover, I note that the Board has now certified the bargaining unit. Accordingly, I find it unwarranted to consider the issue of whether the LPNs are supervisors within the meaning of the Act, and rely upon the Board's determination that a unit comprised of such employees is an appropriate unit for the purposes of collective bargaining.

Respondent, that the RNs are statutory supervisors.

C. The alleged interrogation and impression of surveillance of employees

Abosede Adekanmbi is an LPN who has worked for New Vista since 2000, and presently works on the evening shift. As she testified, on or about January 27, at about 3:30 p.m. she was called into DON Alfeche's office. No one else was present at the time. Prior to this time, Adekanmbi had not received any indication from any Employer representative that they were aware of any Union activity on her part.

Alfeche stated that she had heard that Adekanmbi was passing Union cards to organizers. Adekanmbi denied doing so and demanded that Alfeche should present that person to her. Alfeche asked Adekanmbi again whether she was passing cards, and again Adekanmbi denied doing so. Adekanmbi then stated that employees would like to join the Union and asked if they could do so. As Adekanmbi testified, Alfeche continued to ask her if she had passed cards, and Adekanmbi again denied doing so. After a while, the encounter ended and Adekanmbi returned to her floor. Alfeche did not testify in this proceeding.

D. The January 31 meetings with employees

On January 31, Administrator Weinberger held two meetings with nurses: one for those on the day shift and the other for those on the evening shift.<sup>6</sup> These were attended both by LPNs and RNs.<sup>7</sup> Also attending were Alfeche, a consultant named Toni Krug and an assistant administrator referred to in the record only as "Ben."

The first of these meetings was held at about 11:00 a.m. in the second floor classroom located at the facility. Two employee witnesses, Christiana Adeoye and Wendy Thompson<sup>8</sup> testified as to what occurred at this time. When employees arrived, they signed an in-service attendance record. The exemplar of this document introduced into evidence at the hearing bore the following heading: "Nurses (LPN/RN) should evaluate their CNAs. Nurses to be evaluated by UM & Supervisors. Raises will be based upon performance schedule. Nurses to supervise CNAs." This appears to have been added after the event in question, however, as the witnesses at the hearing testified that when they signed the attendance sheet the top of it was blank.

Thompson and Adeoye both testified that Weinberger stated that he had heard that the nurses were unhappy and that the LPNs were considering joining the Union. He asked the nurses to tell him what their issues and concerns were.

LPN Pat Edwards spoke first and stated that nurses had not received raises for a couple of years. According to both Thompson and Adeoye, Weinberger replied that he knew that and that he was prepared to give nurses a wage increase of 2 percent if they demonstrated good job performance; otherwise they would receive a 1 percent raise.

Thompson complained that the Martin Luther King and Presidents' Day holidays had been taken away from employees; in prior years employees had been paid for those days.

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<sup>6</sup> No meeting was held for the nurses on the overnight shift.

<sup>7</sup> According to the sign-in sheets, 16 nurses attended the morning meeting, and 8 were present for the meeting held for the evening shift.

<sup>8</sup> Thompson testified that she was openly pro-union but that the majority of the organizing at the facility was done discreetly.

Weinberger responded that he was aware of that, and he would contact someone in the payroll department, who was on vacation at the time, and would get back to the employees about that issue.

5           The per diem nurses in the room mentioned that they too had not received raises for some years. Weinberger replied that he would look in the surrounding area to see what other nursing homes were paying per diem employees and get back to them about that.

10           Alfeche stated that when she started working at the facility, she was earning only \$17 per hour and maintained that the nurses were being well paid.

15           Thompson asked whether Weinberger would consider giving the nurses additional sick days. He asked how many they were getting, and she replied 6 and that other nurses in the area received 11 days. Weinberger replied that he did not think that was the case and Ben agreed with him. Alfeche said that nurses in other hospitals receive only 4 days per year. Thompson argued that the CNAs at the facility received 11 sick days and Weinberger replied that he was not aware of that. He then asked Thompson whether she wanted to be a CNA, and Thompson replied that she did not.

20           Adeoye asked Weinberger about a payout for unused sick days, a practice which had been followed in the past but discontinued in the prior year. Weinberger replied that he was not aware of that and would look he would look into it.

25           According to Thompson and Adeoye, Weinberger also told the nurses that he would do his best to have difficult residents transferred elsewhere.

30           During this meeting Alfeche announced that, beginning in February 2011, LPNs would be required to evaluate CNAs. Krug asked Thompson if she was prepared to do so, and Thompson replied that if she had to, she would. As Thompson testified, in the past, such evaluations had been done by unit managers. Although there were RNs in the room, nothing was said about their having new responsibilities. Thompson was uncertain about whether they already performed such tasks.<sup>9</sup>

35           As noted above, Weinberger held another meeting for nurses assigned to the evening shift, which took place at approximately 4:00 p.m. According to Adekanmbi, who attended this meeting, Weinberger stated that he heard that the nurses were not happy and that they were trying to join the Union. He said he would like to know what the nurses' problems were. He stated that he was prepared to give nurses a 2 percent or 1 percent wage increase, depending on their performance evaluations. Adekanmbi stated that she did not think the 2 percent and 1 percent proposed wage increase was fair and argued that employees should be given the same raises. She also complained that the last time raises had been given to nurses, they had not been given to per diems.

45           Adekanmbi also raised the issue of payout for unused sick days and the two holidays taken that had been taken from employees. Ben replied that it seemed as though Adekanmbi had a lot of "issues." However, Weinberger responded that he was considering giving

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50           <sup>9</sup> Adeoye testified that there was no mention of LPNs evaluating the CNAs at this meeting; however judging from the heading which was later added to the in-service attendance sheet and the witness testimony generally and the record as a whole, this fact does not appear to be disputed by the Respondent.

employees additional sick days and reinstating the Martin Luther King and President's Day holidays.

According to Adekanmbi, an employee named Alice Morris complained that her unit had a lot of difficult residents. Weinberger stated that he had been trying to remove them.

As Adekanmbi testified, Alfeche announced that the LPNs would be responsible for evaluating the CNAs. Adekanmbi said that the LPNs did not have enough experience to evaluate or discipline the CNAs and that there were RN supervisors who had previously done such evaluations. Adekanmbi asked what their duties would be now that LPNs were doing these evaluations. Alfeche replied that they would see, and that they had to move on.

Weinberger offered a differing account of events. He testified that at some time prior to January 31, LPN Edwards approached him and told him that the nurses had complaints, so he said he did not have a problem meeting with them. He thereafter met with the nurses in the morning and said that since they had requested a meeting, he wanted to know if there anything they wanted to discuss with him. Weinberger stated that the nurses told him that they wanted systematic raises guaranteed on an annual basis. Weinberger also stated that he thought that the nurses raised the issue of sick days as well. He stated that the word "union" was not mentioned at the meeting.<sup>10</sup>

With regard to the announcement that LPNs would be required to evaluate CNAs, Weinberger testified that this stemmed from the initiation of a new reporting requirement, called the MDS 3.0, in October 2010. Weinberger testified that this entailed a voluminous amount of paperwork for the unit managers toward the end of the calendar year, which was when the CNA evaluations were usually performed. As Weinberger testified, the amount of paperwork required was "off the charts." Thus, it had been decided that the responsibility for evaluating the CNAs would be shifted to nurses, and they were told at the January 31 meeting that, after the annual inspection and review of the facility referred to as the "survey" had been completed,<sup>11</sup> they would take on these additional responsibilities.<sup>12</sup>

<sup>10</sup> While testifying at the representation case hearing, Alfeche denied that Weinberger had mentioned the Union at the January 31 meetings. She did, however, testify that Weinberger asked the nurses what problems they had; that nurses raised the issues of salary, sick time and holidays and that Weinberger promised that he would consider meeting some of their requests.

<sup>11</sup> The survey is conducted on an annual but unannounced basis. The prior year's survey had taken place in December, and was expected to occur any day. Weinberger testified that he did not want to institute any changes until that had taken place.

<sup>12</sup> Although Alfeche did not testify in the instant proceeding, she did offer testimony about her announcement to the LPNs regarding their assuming new duties in evaluating the CNAs during the underlying representation proceeding. Her testimony in this regard is as follows:

Q [by counsel for the Employer]: When did you decide the LPNs would evaluate?

A: When did I decide? It was already in my mind. It's just like I was thinking we have to do this after the survey because we are waiting for the survey right now, too much things going on, it's going to complicate matters. We will be so confused of doing so much things and the MDS just changed to like MDS.3.0, so it's too much. So that's why I said like we have to do everything all after the survey.

Q: Did you make the decision on the day of the in-service?

A: No, I've been thinking about it. But I was just waiting for the survey. But it was just brought in because they were asking about the raise.

Q: How long have you been thinking about it?

A: I would say November. But I just didn't. Like before I would take just one month to finish

Continued

Weinberger further testified that, at the time he met with the nurses on January 31, he was unaware that the Union had filed a petition for an election, and that he did not learn of that fact until sometime in February.<sup>13</sup>

On cross-examination, Weinberger explained that MDS forms are monthly forms which are completed for all residents which describe their mental status, behavior, if they are responsive to activities and so forth. There are nurses whose responsibility it is to ensure that these forms are properly completed. Prior to the institution of the MDS 3.0, the facility completed an earlier version of the form, called MDS 2.0. No exemplar of either of these forms was introduced into the record.

When Weinberger was asked if he had ever pulled nurses off their units for a general meeting in the past, Weinberger replied that he rarely did so and generally met with nurses on their units. He asserted that there had been times, however, when he met with nurses as a group. When asked specifically what these meetings entailed, Weinberger noted meetings in preparation for the facility's annual survey, Weinberger acknowledged that these meetings typically did not include discussions of compensation and benefits, but he maintained that these issues did come up at times. Nurses also generally get together on a day set aside for acknowledgement of the nurses and their contributions known as "Nurses' Recognition Day."

Called on rebuttal, Thompson stated that the only time Weinberger held general meetings with nurses from different units was in preparation for the annual survey. While, Weinberger has, on occasion, stated that if the facility does well, employees will receive a bonus, this promise was never kept. Otherwise there has been no discussion of wages or benefits on such occasions. With regard to Nurses' Recognition Day," the facility provides a lunch for employees, and Alfeche usually addresses them and complements their efforts.

The General Counsel also called Edwards as a rebuttal witness. She testified that at some time prior to the January 31 meeting, she had a conversation with Weinberger in the lobby of Respondent's facility. She could not recall the exact date; only that it was snowing and she therefore presumed that the meeting took place some time in January. Edwards testified that Weinberger told her something to the effect that the nurses were going to get into the Union. Edwards replied that this was because the nurses were not happy because they had not had a raise in 4 to 5 years. Weinberger replied that Edwards was right, and he should have given the nurses a raise.

Edwards denied suggesting that Weinberger hold a meeting with the nurses to discuss their problems.

In an attempt to impeach Edwards, Respondent's counsel brought out the fact that Edwards had been subpoenaed to testify in the underlying representation proceeding and that she failed to attend. As she explained, after receiving the subpoena, Edwards went to Weinberger and explained that due to her age and seniority, the Union would not benefit her

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everyone. But now since it's too long, it takes longer time for the unit managers with the MDS and everything to complete and it's not fair.

<sup>13</sup> The petition was filed on January 25, and the record establishes that it was mailed to the Employer on January 26. Although there is an indication that the petition was also transmitted by facsimile, the General Counsel could not establish when this had been sent.



personally and she had a right to not come to the proceedings. She asked Weinberger not to bother her with it, and he agreed.<sup>14</sup>

All of the witnesses who testified about what occurred at the January 31 meetings asserted that they had never had the authority to discipline or evaluate the CNAs. Moreover, since this series of meetings was held, no actual changes in their duties with regard to evaluating or disciplining or monitoring the performance of CNAs have been implemented, and at least as of the date of the hearing it remained the case that the LPNs had not been required to do so.

#### E. The March 25 meetings

On March 25, at approximately 2:00 p.m., Adeoye attended a mandatory in-service training for morning-shift nurses held in the second-floor classroom in the Respondent's facility and led by Alfeche.<sup>15</sup> Also attending this meeting was LPN Joyce Silva, who testified herein. The in-service attendance sheet shows that several RNs also attended this meeting, although Silva maintained that certain of the RNs listed as attending were not present at the time. In total, 14 individuals assigned the attendance sheet.<sup>16</sup>

A handout was distributed to employees and a video, which tracked the contents of the handout, was shown to employees.<sup>17</sup> Alfeche read through the handout page by page in tandem with showing employees the corresponding video.

The handout bore the title "Disciplinary Actions and Performance Evaluations" and lists duties assigned to the LPNs, as follows:

LPNs are responsible for instructing nursing assistants in proper, preventative safety measures and use of equipment to meet residents['] needs.

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<sup>14</sup> Respondent further brought out the fact that Edwards had testified on a prior occasion in connection with another attempt to organize the LPNs and insinuated that her sense of responsibility for this testimony and the effect it had upon her coworkers influenced her testimony in the instant proceeding. Edwards denied this was the case but acknowledged that her involvement in the prior hearing was one of the reasons she had not wanted to become involved in the current situation.

<sup>15</sup> Although Adeoye testified that this meeting took place at approximately 10:00 a.m., the sign-in sheet indicates that it occurred at about 2:00 or 2:30 p.m. This is generally corroborated by Silva's testimony that the meeting took place in the afternoon. Based upon the record as a whole, I conclude that Adeoye is confused about the time the meeting in question occurred.

<sup>16</sup> According to records introduced into evidence by the Respondent, there was also a meeting at 3:00 p.m., attended by 9 employees and another meeting at an unspecified time on March 25 attended by 6 employees. There were additional meetings held on April 7, 11 and 12 attended by 4, 1 and 8 employees, respectively.

<sup>17</sup> There are two versions of this handout in evidence. The General Counsel's witnesses testified that the exhibit referred to as General Counsel's exhibit 9 was the form they received. Respondent asserted that this exhibit was not complete and introduced its own exhibit into evidence as Respondent's exhibit 1. It is the case, however, that General Counsel's exhibit 9 contains more material than the version of Respondent's exhibit 1 which was placed into evidence. Based upon the witness' mutually corroborative testimony about the version they received and reviewed during the meeting, coupled with inferences drawn from the record as a whole, I generally rely on the General Counsel's exhibit and have referred to Respondent's version only to the extent that it contains material (such as that appearing on the bottom of the page) which appears to have been inadvertently omitted during photocopying.

This means that LPNs should be monitoring the CNAs use of equipment and providing feedback, education or discipline as necessary to insure that the CNA is providing proper safe care for all residents

5 See job description #24<sup>18</sup>

LPNs were further instructed as follows:

# NOTICE OF DISCIPLINARY ACTION

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The former Notice of Corrective Action and Employee Warning Form has been replaced by the Notice of Disciplinary Action

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The following changes have been made to the form to insure proper completion and routing of the forms.

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The LPN must sign after completing the top portion of the form. The top portion indicates that the facts that have created the need for the disciplinary action and specifics related to the employee's unit and shift.

The training then addressed itself to various features of the Employer's progressive discipline program; the levels of discipline contemplated by this program as well as so-called group 1 infractions.

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A section entitled "Performance Evaluations" provides as follows:

In order to be able to monitor and assess CNA performance and in order to evaluate CNA performance, you must be familiar with the CNA job description.

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LPNs are responsible for complet[ing] an annual evaluation of each CNA, which may or may not result in the assessment of a wage increase for the employee.

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Human Resources will provide each LPN with a list of evaluations 30 days prior to the due date, to allow the LPN time to complete the evaluation and to meet with the CNA to review their performance.

There is then a discussion of the Employer's "competency scale" which is used to evaluate the quality of work of employees.

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The handout further states:

LPN's will be evaluated by Unit Managers on their ability to independently assess and monitor CNA performance and their ability to take the necessary corrective actions to improve performance on their unit.

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The version of this handout which employees claimed to have received also has additional

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<sup>18</sup> While the handout contains various references to job descriptions and the Employee Handbook; it does not appear from the documents in evidence or the testimony of the witnesses that any such additional materials were attached to the handout given to employees on that day. Moreover, no party sought to introduce such material into evidence.

material relating to: guidelines for evaluation, Group II infractions and penalties.

A section entitled “LPN Responsibilities” states:

5 As a “supervisor” you are responsible for assessing CNA performance and deciding the appropriate action to take.

10 Since New Vista has a progressive discipline system in place, the LPN will not be able to assess the exact type of infraction as it is not practical for LPNs to have access to employee records at all times of the day.

These records are housed in Human Resources.

Under a section entitled “Educational Consult” employees were advised that:

15 A new educational consult form is also being provided in order to allow LPNs to manage their staff effectively.

20 If an employee needs to be educated on a procedure or alerted to a process, a disciplinary action [may] not need to be taken.

It is acceptable to educate a CNA on their job performance when necessary to insure safe resident.

25 LPNs are to counsel supervised staff (CNAs) and to recommend disciplinary action to the Director of Nursing Services.

See job description #26.

30 This means that LPNs, after monitoring CNA work performance are responsible for making a decision where work performance does not meet standards of care, such as:  
-No action  
-Verbal Warning  
-Educational Consult

35 The LPN’s were additionally instructed that:

40 As a “supervisor” all LPNs are required to:  
Supervise and evaluate all direct resident care provided and initiate all appropriate action. (See job description #2).

This means that the LPN should monitor the care being provided to the residents by the CNAs and intervene where necessary to redirect, educate or discipline the CNAs with regard to any deficiencies.

45 The handout also contains exemplars of a CNA “job description and performance standards form (which is, in fact, a comprehensive employee evaluation form), an “education consult” form and a “notice of disciplinary action” form.

50 There is no evidence that any LPN ever completed any of these forms with regard to any CNA and, as noted above, the employees who testified herein all stated that this new program with its concomitant responsibilities has not been implemented, and that there has been no

change in their work relationships with the CNAs.

Weinberger offered the following testimony about the factors leading to the March 25 meetings:

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Q: [by counsel for Respondent]: Can you describe to the Judge what occurred in your setting up that meeting? What precipitated the meeting?

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A: Well, I think what precipitated the meeting was that we had the hearing here at the National Labor Relations Board and some of my nurses got up and they clearly said they didn't read what they were required to do, they didn't read their employee handbook, they didn't read their job description well and we wanted to re-educate all of our nurses as to what their responsibilities were.

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Q: Now to your knowledge was –did you – at that meeting on March 25<sup>th</sup>, did you alter the duties of the licensed practical nurses?

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A: No, we wanted to just clarify it for them. We did not alter anything. As a matter of fact, I even – I think we include[ed] the existing job descriptions and their evaluations, to tell them here's where it says that and we brought it to their attention.

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Weinberger stated that the content and nature of the in-service training was “reiterating to the employee what was in their job description and what they were required to do as part of their job requirements.” Weinberger further testified that the LPNs were, at all times, supervisors at the facility.

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The employees who testified at the hearing all maintained that since the March 25 in-service training no actual changes have been made to their job duties and their relationship with regard to the CNAs has remained as it always had been. In particular, they have neither evaluated nor disciplined any CNA.

### III. Analysis and Conclusions

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#### A. General Credibility Resolutions

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As a general matter I credit the testimony of the employee witnesses, who all were employed by Respondent as of the date of the hearing. As the Board has acknowledged, when a current employee offers testimony contrary to the interests of her employer, such testimony tends to be reliable. As the Board has stated: “the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests ... [t]hus, a witness' status as a current employee may be a significant factor, but it is one among many which a judge utilizes in resolving credibility issues.” *Advocate South Suburban Hospital*, 346 NLRB 209 fn. 1 (2006), citing *Flexsteel Industries*, 316 NLRB 745 (1995), *enfd.* 83 F.3d 419 (5<sup>th</sup> Cir. 1996). See also *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

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Aside from any legal presumptions, however, there are other independent factors which lead me to credit the testimony of the employees. As an initial matter, I note that their demeanor was impressive. All gave composed, concise and thoughtful testimony and were generally cooperative when being questioned on cross-examination. Although there were some failures of recollection, these were generally regarding ancillary matters and were of the sort that one might reasonably expect from lay witnesses testifying truthfully to the best of their recollection.

Moreover, the testimony of the employee witnesses was generally corroborative. Thus, Adeoye and Thompson presented consistent accounts of what occurred during 10:00 a.m. meeting on January 31. Adekanmbi's version of what occurred later that day was substantially similar. Moreover, Weinberger failed to specifically deny the nurses' testimony to the effect that they were asked about their concerns and they raised the issues of wage increases, the elimination of paid holidays, raises for the per-diem nurses, payment for accrued sick leave and disruptive residents. The consistent testimony of the witnesses that Weinberger offered them 1 percent or 2 percent wage increases and promised to look into and possibly remedy the other issues raised during the meetings was not rebutted. Similarly, it is not rebutted that Alfeche told the LPNs at this meeting that, in the future, they would be responsible for evaluating the CNAs.

Conversely, and as will be discussed in further detail below, I found that Weinberger was not a credible witness in regard to certain salient factors for several reasons which include unexplained vagueness, the fact that his testimony was not corroborated by apparently available witnesses or other evidence, the inherent improbabilities of events as he recounted them and rebuttal by more reliable evidence.

Specifically, I do not credit Weinberger's testimony that he agreed to January 31 meetings because of his prior conversation with Edwards; or that Respondent has in the past held general meetings with its employees which included discussions of their terms and conditions of employment. I also do not credit Weinberger's assertion that Respondent did not learn of the representation petition until sometime in February 2011; that the word "union" was never mentioned at any of the meetings held on January 31 and that the decision to have LPNs evaluate and issue discipline to the CNAs was made as a result of the fact that a new reporting requirement involved voluminous paperwork for the floor managers. I also do not credit, for reasons discussed below, that the March 25 meetings were held to "re-educate" nurses as to their existing job responsibilities.

As an initial matter, I note that Edwards, whose testimony I credit for the reasons cited above, clearly denied approaching Weinberger and suggesting he meet with employees. In this regard, Edwards testified that it was Weinberger who broached the subject of the Union with her. Weinberger's suggestion that he has, in the past, held general meetings with employees for the purpose of discussing matters such as salaries and benefits was credibly rebutted by both Thompson and Adekanmbi. Moreover, I note that Weinberger's testimony in this regard was unimpressive beyond the extent that one might attribute to a mere failure of recollection: he was simply unable to provide any probative detail regarding what might have occurred in the past.

I fail to credit Weinberger's rather improbable assertion that he did not know about the Union petition until some time after the January 31 meeting. The record establishes that the petition was mailed from the Region's Newark, New Jersey, office to the Respondent's Newark, New Jersey, facility on January 26. Moreover, the credited testimony of Edwards and Adekanmbi establishes that Weinberger and Alfeche each broached the subject of the Union with them at a time prior to the meetings with employees on January 31. In fact, Weinberger admitted that his discussion with Edwards occurred prior to this time.

I additionally discredit Weinberger's assertion that he did not mention the Union at the January 31 meeting, as it is uniformly contradicted by the employee witnesses who testified herein.<sup>19</sup> Respondent argues that Alfeche corroborated Weinberger in the underlying

<sup>19</sup> Edwards did not offer testimony about this meeting but she was called on rebuttal solely to rebut

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representation case proceeding, however I do not rely upon such testimony. Insofar as Respondent is concerned, such testimony is hearsay evidence. Moreover, I did not observe Alfeche's testimony and therefore have no independent basis to evaluate her demeanor. In addition, as is well settled, a representation proceeding is akin to an investigatory process rather than an adversarial one and credibility resolutions are generally not part of the Regional Director's calculus in determining whether to direct an election.<sup>20</sup>

Moreover, it is apparent that this is a significant factual dispute going directly to the issue of Respondent's motive and there is no evident reason why Respondent could not have produced Alfeche, or Ben for that matter, at the instant hearing, to corroborate Weinberger's testimony on this important and contested issue. Respondent's failure to do so leads me to conclude that any such testimony, if truthful, would not have been favorable to its position in this case. *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15 fn. 1 (1977) (where respondent offered no explanation as to why supervisors did not testify, the drawing of an adverse inference against respondent is proper); *Flexsteel Industries*, supra at 758 (failure to examine a favorable witness regarding any factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference against [a respondent]" regarding any such fact).

I further discredit Weinberger's testimony regarding the rationale for and timing of the announcement of the new duties for LPNs. As discussed above, Weinberger stated that he was responding to the increased amounts of paperwork caused by the implementation of the MDS 3.0, but waiting until after the annual survey to implement it. I note, however, that Weinberger failed to present specific testimony about any additional reporting requirement created by the MDS 3.0 or the burden it may have placed on his employees. As will be discussed in further detail below, Weinberger's vague and general testimony about such matters is insufficiently probative. I further note that Weinberger acknowledged that the MDS forms were completed on a monthly basis and he simply failed to explain why there would be any additional work for employees at the specific time of year that CNA evaluations were typically conducted. In addition, Weinberger's testimony establishes that the facility employs four RN employees whose responsibilities are to ensure compliance with the MDS and other reporting requirements and no testimony whatsoever was adduced regarding any purported additional duties the new form required for these employees. Moreover, Respondent failed to present testimony or any other evidence as to whether these particular employees had any responsibility whatsoever in connection with the evaluation of the CNAs.

In general, I found Weinberger to be a witness who offered vague and self-serving testimony which was markedly lacking in specificity and detail. In this regard, the Board has held that a lack of specific recollection, general denials and comparative vagueness is generally insufficient to rebut more detailed testimony of other witnesses. *Precoat Metals*, 341 NLRB 1137, 1150 (2004); see also *Mercedes Benz of Orlando Park*, 333 NLRB 1017, 1035 (2001), enf'd. 309 F.3d 452 (7<sup>th</sup> Cir. 2002) (general denials by witness are insufficient to refute specific and detailed testimony advanced by opposing side's witness).

Accordingly, based upon the foregoing, I generally credit the testimony of the General Counsel's witnesses here, unless such testimony is inherently improbable or otherwise contradicted by other, more reliable evidence. Conversely, I have found ample reason to reject

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Weinberger's testimony that the January 31 meeting had been as a result of their prior discussion.

<sup>20</sup> I note, however, that the Regional Director did address certain circumstances where Alfeche's testimony was contradicted by other record evidence.

much of what Weinberger testified to, to the extent his testimony was rebutted by more reliable, detailed and corroborated testimony offered by Respondent's employees.

B. The interrogation of employees

The General Counsel has alleged that DON Alfeche unlawfully interrogated Adekanmbi in violation of Section 8(a)(1) of the Act. Section 7 of the Act grants employees, among other rights, "the right to self organization, to form, join or assist labor organizations." Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in section 7."

In determining whether an interrogation violates Section 8(a)(1) of the Act, the Board considers "whether under all the circumstances the interrogation reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act." *Bloomfield Health Care Center*, 352 NLRB 252 (2008), quoting *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9<sup>th</sup> Cir. 1985). This is an objective standard, and it does not turn on whether the "employee in question was actually intimidated." *Multi-Ad Services*, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7<sup>th</sup> Cir. 2001). Among the factors that may be considered in making such an analysis are the identity of the questioner, the place and method of the interrogation, the background of the questioning, the nature of the information sought, and whether the employee is an open union supporter. *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB No. 57 2011 (incorporating by reference, in relevant part 353 NLRB 1294, 1295 (2009)). Applying these factors, I find that Alfeche's interrogation of Adekanmbi was coercive.

The first two factors strongly indicate a coercive interrogation here. It was carried out by the most highly ranked nursing supervisor at the facility and took place in her office, to which Adekanmbi had been summoned. The context of the questioning and the manner in which it was conducted also contributed to the coercive circumstances. Alfeche's inquiry was neither casual nor accidental; it was a direct test of Adekanmbi's knowledge of and involvement in union activity in the facility. In this regard, although the Union was in the midst of an organizing campaign, there is no evidence that Adekanmbi held herself out as or was otherwise known as an open supporter of the Union prior to the interrogation. Moreover, Adekanmbi's un rebutted testimony establishes that Alfeche refused to accept her denials and continued asking Adekanmbi about whether she had been passing Union cards. This continued insistence upon an affirmative answer, under the circumstances described above, further enhanced the coercive impact of Alfeche's questioning. Thus, Adekanmbi was put in the position of having to repeatedly confirm or deny protected activity that she had a right to keep confidential. See *Bloomfield Health Care Center*, supra.

Moreover, there is no evidence of any other lawful reason why Alfeche summoned Adekanmbi to her office that day.<sup>21</sup> Accordingly, based upon the foregoing I find that, by coercively interrogating Adekanmbi about whether she had been passing Union cards, Respondent violated Section 8(a)(1) of the Act.

C. The unlawful impression of surveillance

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<sup>21</sup> The Respondent's failure to call DON Alfeche to testify with regard to this issue also gives rise to an adverse inference that she would have testified against the Respondent's interest. *Martin Luther King, Sr., Nursing Center*, supra at 15 fn. 1 (1977); *Flexsteel Industries*, supra at 758.

The General Counsel further alleges that Alfeche's interrogation of Adekanmbi unlawfully created an impression that Adekanmbi's Union activities were under surveillance by Respondent in violation of Section 8(a)(1) of the Act.

Employer surveillance or creation of an impression of surveillance constitutes unlawful interference with Section 7 rights because employees should feel free to participate in union activity "without the fear that members of management are peering over their shoulders [.] See *Flexsteel Industries*, 311 NLRB 257, 257 (1993). An employer creates an impression of surveillance when "the employee would reasonably assume from the [employer's] statement that [his] union activities had been placed under surveillance." Ibid. (violation found where the personnel manager informed an employee on two occasions that he had heard a rumor that the employee instigated the union campaign and was passing out authorization cards). In general, the Board finds that this test has been met when an employer reveals specific information about a union activity that is not generally known, and does not reveal its source. Under such circumstances, employees may reasonably conclude that the information was obtained through employer monitoring. *Stevens Creek Chrysler Jeep Dodge*, supra, (quoting *North Hills Office Services*, 346 NLRB 1099, 1103 (2006)) (employer's failure to identify employee source of information was the "gravamen" of an impression of surveillance violation); *Sam's Club*, 342 NLRB 620, 620-21 (2004) (store manager told employer he had heard the employee was circulating a petition about wages without revealing how he came by the information); *Avondale Industries*, 329 NLRB 1064, 1265 [or 1065] (1999) (supervisor told employee that he knew employee was a union supporter and, when asked how he got his information, responded that he "couldn't say").

Respondent argues that the evidence fails to establish that Alfeche was surveilling Adekanmbi, and suggests in its post-hearing brief that Alfeche was merely discussing rumors relating to organizational activities. In this regard, Respondent argues that there is no evidence that Alfeche's information came from "spying" as opposed to the "rumor mill." Respondent argues that Alfeche's conduct was not unlawful and cites several cases in support of this contention.

In *SKD Jonesville Division, LP*, 340 NLRB 101 (2003), the administrative law judge, affirmed by the Board, found that the respondent did not unlawfully create the impression of surveillance when he told an employee that, "he heard that I was going to organize. . . that the employees wanted me to organize a union[.]" In finding no violation, the judge reasoned that one could conclude from the statement at issue that someone opposed to the Union's activities had voluntarily informed the manager about the employee's union activities. In *South Shore Hospital*, 229 NLRB 363 (1977), also relied upon by the Respondent, the Board concluded that a supervisor's statement to an employee that he "had just come from a meeting with [the respondent's director] and talk of central having a union was all over the hospital" was not unlawful. In so concluding, the Board noted that it has held that a respondent does not create an impression of surveillance by merely stating that it is aware of a rumor pertaining to the union activities of employees as long as there is no evidence indicating that the respondent could only have learned of the rumor through surveillance. Id (citing *C. Murphy Company*, 217 NLRB 34, 36 (1975)). In *Clark Equipment Company*, 278 NLRB 498, 503 (1886), also relied upon by Respondent, the Board found that two statements at issue were not violative of the Act. The first involved a foreman's comment to an employee that not many people were attending the union meetings on Sunday and he heard that only about 500 people had signed cards. When the employee asked the foreman how he knew this, the foreman responded that this was what he had heard. The Board concluded that, because the foreman's statements contained only general or known facts, an employee to whom this kind of statement was directed could not



reasonably believe that the respondent had intentionally embarked on a course of monitoring union activity. With regard to the second comment, a supervisor told an open union supporter who had been passing out union leaflets that he had heard about that activity, and was disappointed in the employee. When the employee asked how the supervisor had found out about it, the supervisor replied that “one of the guys” had seen him. The Board concluded that in this instance the open union activity of an employee was witnessed and commented upon; thus the supervisor’s statement could not reasonably convey the impression that the respondent had placed union activity under surveillance. For the following reasons, I do not find the authority relied upon by Respondent to be apposite, or persuasive, here.<sup>22</sup>

As is well-settled, the test for whether an employer unlawfully creates an impression that an employee’s union activities are under surveillance is whether the employee would reasonably assume from the statement that his or her union activities were under surveillance. *United Charter Service*, 306 NLRB 150 (1992). Moreover, as was stated in *Mountaineer Steel, Inc.*, 326 NLRB 787, 787 (1998) enfd. 8 Fed. Appx. 180 (4<sup>th</sup> Cir. 2001), “the Board does not require that an employer’s words on their face reveal that the employer acquired its knowledge of the employee’s activities by unlawful means” (quoting *United Charter Service*, supra at 151).

Here, there is no evidence that the Union organizing at Respondent’s facility was a publicized, open event. To the contrary, witness testimony establishes generally that it was conducted quietly. Moreover, Respondent has presented no evidence that Adekanmbi held herself out as or was known as an open Union supporter. Nevertheless, Alfeche, Respondent’s most highly-ranked nursing supervisor, summoned Adekanmbi to her office and stated that she had heard that Adekanmbi was passing cards to Union organizers. When Adekanmbi demanded to be confronted with the source of such information, Alfeche’s only response was to repeat these allegations which, as I have found above, amount to an unlawful interrogation. Thus, Alfeche failed to reveal the source of her information and, therefore, it was reasonable for Adekanmbi to conclude that it was obtained through employer monitoring. Further, Alfeche’s comments did not address general rumors in the facility or union activities in the abstract or at large, but were addressed individually to Adekanmbi and specific protected conduct she was alleged to have engaged in. Moreover, no innocent explanation for Alfeche’s comments was communicated to Adekanmbi at the time. *Mountaineer Steel*, 326 NLRB at 787 fn. 4; see also *United Charter Service*, 306 NLRB at 151. And there is no evidence of any other ostensible reason why Alfeche summoned Adekanmbi to her office on this occasion. For these reasons, I find that Alfeche’s comments reasonably suggested to Adekanmbi that her union activities were under surveillance.<sup>23</sup> Accordingly, I find that Respondent unlawfully created an impression of

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<sup>22</sup> Respondent further relies upon *Astro Container Company*, 180 NLRB 815 (1970). There, the Board, contrary to the trial examiner, found that a supervisor’s series of statements to an employee could not be fragmentized, but must be viewed in their entirety. To the extent, therefore, that Respondent attempts to parse what Alfeche is alleged to have told Adekanmbi, such authority fails to support its contentions here.

<sup>23</sup> Respondent further attempts to argue that because Adekanmbi denied Alfeche’s accusations, Alfeche cannot be found to have engaged in surveillance, because she was apparently incorrect. Such an assertion fails to take into account that an employee may, for any number of reasons, deny an employer’s accusations of union activity. Moreover, as is set forth above, whether an employer creates the impression of surveillance among its employees is not dependent upon whether that surveillance has actually taken place: the test is whether the comments at issue would reasonably suggest to an employee that his or her protected conduct was the subject of scrutiny. Here, for the reasons set forth above, I have found that the Respondent has met that test.

surveillance in violation of Section 8(a)(1) of the Act.<sup>24</sup>

D. The solicitation of employee complaints and grievances and promise of wage increases and other improved terms and conditions of employment

Section 8(a)(1) of the Act prohibits employers from soliciting employee grievances in a manner that interferes with, restrains or coerces employees in the exercise of Section 7 activities. While the solicitation of grievances alone is not per se unlawful, it may raise an improper inference that the employer is promising to remedy such grievances. *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004), *enfd.* 165 Fed. Appx. 435 (6<sup>th</sup> Cir. 2006); *Uarco, Inc.*, 216 NLRB 1, 2 (1974). Moreover, as the Board has held, the solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy those grievances. *Manor Care of Easton PA*, 356 NLRB No. 39, slip op. at 19 (2010)(citing *Capitol EMI Music*, 311 NLRB 997, 1007 (1993), *enfd.* 23 F.3d 399 (4<sup>th</sup> Cir. 1994)); see also *Bally's Atlantic City*, 355 NLRB No. 218, slip op. at 8 (2010).

In this case, it is clear that the meetings Weinberger held with employees on January 31 were for the precise purpose of and did in fact involve the solicitation of grievances. Moreover, I find, based upon the credited testimony of the employee witnesses and the record as a whole that this meeting occurred within the context of an organizational campaign of which the Employer was well aware. The credited evidence establishes that Weinberger specifically referenced the Union campaign and asked his nurses why they were unhappy. He expressly promised his employees a wage increase. With regard to other issues, while Weinberger may have not made a similar sort of explicit promise, under all the circumstances he clearly conveyed an intent to address and remedy at least some of the issues raised by employees at these meetings. According to the credited testimony of employees, Weinberger said he would look into matters such as the removal of two paid holidays from employees, raises for the per diem nurses, payment for accrued sick days and the problem of difficult residents.

To the extent Respondent has attempted to rely upon an asserted past practice, that is to suggest that Weinberger held similar sorts of meetings with his employees prior to the Union's organizational campaign, such a contention is misplaced and unsupported by the credible evidence. As an initial matter, the evidence establishes that Weinberger had never in the past summoned his nurses together for the purpose of discussing their dissatisfaction with their terms and conditions of employment. In fact, the only group meetings held regarded facility preparation for the annual survey and the celebration of Nurses Recognition Day. Moreover, an asserted past practice of soliciting grievances does not immunize an employer from liability when the solicitation is accompanied by a promise to remedy grievances to discourage unionization. "it must be borne in mind that the issue is. . . whether the instant solicitation implicitly promised a benefit." *American Red Cross Missouri-Illinois*, 347 NLRB 347, 351 (2006).

Here, I find that, in conjunction with his solicitation of grievances in the context of a

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<sup>24</sup> To the extent Respondent has based its defense to the foregoing allegations on Adekanmbi's purported supervisory status, I find that Respondent has failed to offer any newly discovered or previously unavailable evidence that she has new or additional job responsibilities that would distinguish her from the bargaining unit of LPNs as a whole. Moreover, I have examined Adekanmbi's testimony in the underlying representation case proceeding and fail to find any basis to conclude that she, as an individual target of allegedly unlawful conduct, is a supervisor within the meaning of Section 2(11) of the Act. Cf. *Bon Harbor Nursing & Rehabilitation Center*, *supra*.

Union organizational campaign, Weinberger both expressly and implicitly promised employees improved terms and conditions of employment. Accordingly, his solicitation of grievances from his employees as well as the express and implied promises themselves are in violation of Section 8(a)(1) of the Act.

E. The announcement of and purported assignment of additional duties to LPNs

The General Counsel has alleged that by altering the duties of its LPNs by requiring them to complete employee evaluations and monitor the performance of and discipline the CNAs, Respondent has violated Section 8(a)(1) and (3) of the Act. Respondent argues that there is no unlawful discrimination here because there is no proof of improper motive, animus or a causal relationship between the announcement of these duties and the employees' protected conduct. Respondent argues that the LPNs were always considered to be supervisory employees and there is no evidence of any attempt to destroy an existing bargaining unit. Respondent further contends that the announcement of these additional duties did not amount to an adverse employment action.

The Board has long held that an employer violates Section 8(a)(1) and (3) of the Act by promoting employees to supervisory positions, and thus stripping them of their right to self-organization, because of a union campaign. *Hospital Motor Inn, Inc.*, 249 NLRB 1036, 1036-1037 (1989) enfd. 667 F.2d 562 (6<sup>th</sup> Cir.), cert. denied 459 U.S. 969 (1982); *United Oil Mfg. Co.*, 254 NLRB 1320, 1320, 1324-25 (1981), enfd. on other grounds, 672 F.2d 1208 (3<sup>rd</sup> Cir), cert. denied 459 U.S. 1036 (1982). Similarly, an employer violates the Act by accelerating a promotion or other employment action affecting employee status, in response to union activity. *AMFM of Summers County, Inc.*, 315 NLRB 727 (1994), enfd. 89 F.3d 829 (4<sup>th</sup> Cir. 1996)(promotion to supervisory status); *Matson Terminals, Inc.* 321 NLRB 879, 879 (1996), enfd. 114 F.3d 300 (D.C. Cir. 1997) (same); see also *Dickerson-Chapman, Inc.*, 313 NLRB 907, 930-940 (1994); *Venture Packaging, Inc.*, 294 NLRB 544, 551-553 (1989) enfd. mem. 923 F.2d 855 (6<sup>th</sup> Cir. 1991).

As noted above, Respondent maintains that there is no evidence of unlawful motivation here. In analyzing motive, the Board applies the test articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982).

Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support the inference that the protected conduct was a "motivating factor" in the challenged decision. The General Counsel makes such a showing by proving the employee's protected activity, the respondent's knowledge of that activity, and animus toward the employee's protected conduct, *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Inferences of animus or discriminatory motivation may be warranted and may be drawn from circumstantial evidence and the record as a whole. See *Flour Daniel, Inc.* 304 NLRB 970 (1991); *Real Foods Co.*, 350 NLRB 309, 312 fn. 17 (2007)(unlawful motive demonstrated not only by direct, but by circumstantial evidence such as timing, disparate or inconsistent treatment, expressed hostility, departure from past practice and shifting or pretextual reasons being offered for the action).

Once the General Counsel establishes its prima facie case, the burden of persuasion then shifts to the respondent to prove that it would have taken the same action even in the absence of protected activity. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1980); *Naomi Knitting Plant*, supra. At this time, a respondent does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co.*, 316 NLRB 771 (1995); *Manno Electric, Inc.*, supra at 280, fn. 12.

Here, the evidence adduced by the General Counsel establishes protected conduct (the Union campaign) and, as discussed above, Respondent's knowledge of that campaign. The evidence further shows that the Respondent announced new duties for its LPNs on two occasions, the first within one week after the representation petition was filed and the second shortly after the Regional Director issued the Decision and Direction of Election in which he found that the LPNs were not statutory supervisors. Within days of each of these seminal events, Respondent made announcements which appeared to shift supervisory responsibilities to the LPNs. Thus, on January 31, Alfeche announced that, as of the following month, LPNs would be required to evaluate CNAs. After the Employer's argument that its LPNs were supervisors was rejected by the Regional Director, LPNs were told, for the first time, that they were responsible for: instructing the CNAs on safety measures and use of equipment; completing a newly-devised form entitled "Notice of Disciplinary Action"; familiarizing themselves with the CNA job description; completing annual evaluations of CNAs; assessing CNA performance; counseling staff and recommending educational consults or disciplinary action, among other things. The LPNs were also advised that they now would be evaluated on their fulfillment of these additional responsibilities.<sup>25</sup>

Contrary to Respondent's contentions, these attempts to alter the duties of the LPNs may be found, in and of themselves, to demonstrate animus to employees' protected conduct. *Regency Manor Nursing Home*, 275 NLRB 1261, 1277 (1985); *Matson Terminals*, supra at 884. Moreover, the timing of such attempts further demonstrates an unlawful motive. See generally, *Allstate Power Vac.*, 357 NLRB No. 33 (2011), slip op at 4, quoting *NLRB v. Rubin*, 424 F.2d 748, 750 (2d Cir. 1970) ("stunningly obvious" timing); *McClendon Electrical Services*, 340 NLRB 613 fn. 6 (2003) ("where adverse action occurs shortly after an employee has engaged in protected activity, an inference of unlawful motive is raised.") Further, as has been discussed elsewhere in this decision, this purported altering of responsibilities also came during a period when Respondent was engaged in other unlawful conduct such as the interrogation of and creating the impression of surveillance among its employees and the solicitation of grievances coupled with express and implied promises of benefits. I infer animus from these contemporaneous unfair labor practices as well. See *Amptech, Inc.*, 342 NLRB 1131, 1135 (2004). I further infer animus from the fact that Respondent's wholesale attempt to create supervisory status among its LPNs would not have merely reduced the size of the unit, but would have eradicated it. See *Matson Terminals*, supra at 884.

Thus, I conclude that the General Counsel has made out a strong prima facie case under *Wright Line*. It, therefore, now falls to the Respondent to shoulder a "substantial" burden to show that it would have assigned these additional duties to the LPNs for nondiscriminatory reasons. *Bally Atlantic City*, 355 NLRB No. 218, slip op. at 3 (2010), affd. *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929 (D.C. Cir 2011) ("Where, as here, the General Counsel makes a strong showing of discriminatory motivation, the employer's rebuttal burden is substantial.") Thus, Respondent is obliged to prove, by a preponderance of the evidence, that it would have announced these changes in the duties of its LPNs notwithstanding their protected activity. Here, for the reasons set forth below, the evidence adduced by Respondent and otherwise set forth in the record fails to meet that burden.

In defending the lawfulness of its actions, Respondent points to its long collective-

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<sup>25</sup> As Counsel for the General Counsel has noted, in the Decision and Direction of Election the Regional Director relied, in part, on the fact that the LPNs had never been evaluated based on their purported ability to monitor and discipline the CNAs.

bargaining history with the Union and the fact that it voluntarily recognized Union as the representative of its 4 or 5 cooks during the prior year. Weinberger’s conclusory testimony about his amicable relations with the collective-bargaining representative of his other employees, however, is insufficient to prove that the Employer would not seek to resist an organizational campaign among a bargaining unit of LPNs. *Hearst Corp.*, 281 NLRB 764, 781-782 (1986). In this regard I note that the petitioned-for unit is comprised of a substantial number of employees and, moreover, that Respondent had not given these employees a wage increase for some period of time and had, in the past year, reduced certain other benefits in terms of paid holidays and credit for unused sick leave. It is apparent that a collective-bargaining representative might well seek to address employee concerns in this regard.

Respondent’s reliance upon the onerous reporting requirements of the MDS 3.0 is similarly unavailing. Although Weinberger testified that the paperwork required was “just off the charts” he failed to offer any specific or concrete testimony as to how this new version of an existing form created an unduly onerous work burden for his employees. This is particularly the case where Weinberger admitted that there were four such employees who were specifically designated to address such matters. Weinberger’s assertion that there was a significant end-of-year burden is called into question by his admission, on cross-examination, that the forms must be completed on a monthly basis. In addition, and notwithstanding any of the foregoing, Respondent could have produced exemplars of the documents in question to substantiate its claims, but failed to do so or provide an explanation as to why it could not.

Not only does Weinberger’s conclusory and unsubstantiated testimony fail to meet Respondent’s burden of persuasion, it appears to be false and as such is evidence of pretext, and accordingly, of unlawful motivation. *TCB Systems, Inc.*, 355 NLRB No. 162, slip op. at 3 (2010)(failure to substantiate an asserted rationale for a disputed employment action coupled with some evidence undermining that rationale will support a finding of unlawful motivation.) See also, *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (“when the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual. . .the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal –an unlawful motive”)(internal quotation omitted).<sup>26</sup>

Respondent’s contention that the March 25 meeting was nothing more than an attempt to “re-educate” the nurses about their existing job responsibilities must be rejected as unsupported by the record. As an initial matter, I note that in its opposition to the Acting General Counsel’s Motion for Summary Judgment, Respondent took a wholly inconsistent approach and, as the Board noted, specifically argued that the job responsibilities of the LPNs had indeed been altered on that date and that, based upon these new duties, the Regional Director might well have found the LPNs to be supervisors. It is well-settled that such statements may be deemed admissions binding on the Respondent. See e.g. *McKenzie Engineering Co.*, 326 NLRB 473, 485 fn. 6 (1998); *Hogan Masonry*, 314 NLRB 332, 333 fn. 1 (1994). In addition, one may view such varying contentions as nothing more than “shifting defenses” which in and of themselves may be found to constitute evidence of unlawful motive. See *McClendon Electrical Services, Inc.*, 340 NLRB 613, 614(2003) (“[s]uch shifting assertions strengthen the inference that the true reason was for [protected] activity” (citation omitted)). In any event, leaving such contentions aside, it is evident that the material distributed to the LPNs on that date demonstrates that that the Respondent was attempting to alter their job responsibilities to so imbue the LPNs with the appearance (if not the reality) of supervisory status. Thus, as has been

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<sup>26</sup> I also note that there is no evidence that Respondent ever told its LPNs that new reporting requirements imposed by the MDS 3.0 were the reason these new duties were being assigned to them.

discussed in further detail above, the LPNs were told that they had job responsibilities of a serious and substantial nature that they had never before performed.

Weinberger testified that the meeting was called because the LPNs had testified that they didn't read what they were required to do, didn't read their employee handbook or job descriptions. I note, however, that Weinberger failed to identify any precise duty or set of responsibilities which had been assigned to the LPNs of which they were apparently unaware.<sup>27</sup> Further, it does not escape notice that the contention that the LPNs had always been responsible for the oversight and evaluation of the CNAs, but were unaware of these duties, is contrary to the testimony adduced by and relied upon by Respondent that these were new responsibilities necessitated by the MDS 3.0 which had been announced on January 31 but not implemented because of the imminence of the annual survey. Moreover, it defies credulity that 38 of Respondent's employees would have been oblivious to their extant job responsibilities and, further, that they would not have been instructed to and would not have been required to perform such duties had they, in fact, been assigned to them.

In arguing that there is no evidence that it is seeking to destroy the bargaining unit of LPNs, Respondent relies upon *Bridgeport and Port Jefferson Steamboat Co.*, 313 NLRB 542 (1993). In that case, the Board held that it was not a violation for the respondent to assign supervisory duties to the captains of its vessels, even though the Board had previously held that they were not statutory supervisors. There, however, the Board explicitly stated that the reason that the assignment of the new supervisory duties was lawful was that the employer's action was "not a sham aimed at undermining the Union but a sincere effort to provide onsite supervision of its vessels through the performance of supervisory duties by its captains." 313 NLRB at 544. In that case, this conclusion was supported by credible evidence including written directives and memoranda, showing that the employer was having serious problems with the operation of its vessels due to a complete lack of on-board supervision. The evidence showed that the Bridgeport's recognition of these problems, and its desire to remedy them, predated the Board's ruling that the Bridgeport's captains were non-supervisory employees. The evidence also showed that Bridgeport had not merely assigned the new supervisory tasks, but "required the captains to perform" them. *Id.*

The facts of the instant case stand in stark contrast to those in *Bridgeport*. Here, there is a lack of credible evidence that the Respondent contemplated assigning supervisory duties to the LPNs prior to the organizing campaign. The scant evidence which goes to this issue fails to establish a legitimate business purpose for the decision to do so. In particular, there is no credible, specific or probative evidence of a need for additional supervisory personnel at any relevant time. With regard to Respondent's claim that these individuals possessed, but did not realize, their supervisory job responsibilities, aside from the fact that there is no documentary evidence to support such a claim, the credited testimony of the employee witnesses on this issue is unequivocal that, prior to the organizational campaign, they were never advised of any supervisory responsibilities with regard to the CNAs. On the Bridgeport's vessels there had been a true supervisory vacuum. Respondent, to the contrary, has an established supervisory hierarchy comprised of administrators, unit heads and registered nurses.

Moreover, the evidence demonstrates that, unlike the disputed employees in *Bridgeport*, the LPNs have not been called upon to exercise their new supervisory duties. This supports the

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<sup>27</sup> Respondent's counsel made some attempt to cross-examine the General Counsel's witnesses about references to their job description in the March 25 presentation, but no specific evidence was adduced in this regard.

conclusion that the assignment of the new duties to these employees was mere pretense. Thus, under all the circumstances and in sharp contrast to the situation in *Bridgeport*, Respondent's decision to impart supervisory duties to the LPNs can fairly be deemed a "sham aimed at undermining the Union" and therefore unlawful.<sup>28</sup>

Thus, based upon the foregoing, I find that Respondent's attempts to imbue its LPNs with apparent indicia of supervisory authority by assigning them duties which included completing employee evaluations of, monitoring the performance of and disciplining the CNAs was nothing more than an attempt to "wrest away from the LPNs the right under the Act to engage in union activity. In short, Respondent's action was simply part of a scheme to deprive employees of Section 7 rights guaranteed them by the Act. . . ." *AMFM of Summers County*, supra at 730 (citing *Regency Manor Nursing Home*, supra). Accordingly, I find that in doing so, Respondent violated Section 8(a)(1) and (3) of the Act.<sup>29</sup>

#### Conclusions of Law

1. Respondent, New Vista Nursing and Rehabilitation, LLC is and at all material times has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. 1199 SEIU United Healthcare Workers East, NJ Region, the Union, is and at all material times has been a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating employees about their union activities and sympathies, on or about January 27, 2011, Respondent violated Section 8(a)(1) of the Act.

4. By creating an impression among its employees that their union activities were under surveillance, on or about January 27, 2011, Respondent violated Section 8(a)(1) of the Act.

5. By soliciting employee complaints and grievances and promising employees increased benefits and improved terms and conditions of employment to encourage them to refrain from union organizational activities, on or about January 31, 2011, Respondent violated Section 8(a)(1) of the Act.

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<sup>28</sup> In its post-hearing brief, Respondent advances additional arguments which are similarly unavailing. For example, Respondent further contends that only a "handful" of employees attended the January 31 meetings: thus the purpose could not have been to create supervisory status among these employees. As a factual matter, Respondent is incorrect. The sign-in sheets for these meetings indicate that 16 employees attended the morning meeting and 8 attended the one held in the afternoon. While it is the case that no meeting was held for the overnight shift of employees, as Respondent acknowledges, the record establishes a supervisor was designated to advise those employees of their new duties. Respondent further argues that since the record shows that LPNs perform the same duties as RNs, and the General Counsel acknowledged on the record that RNs are statutory supervisors, such an acknowledgement is tantamount to an admission that the LPNs are supervisory personnel as well. While it is the case that while acting *in their capacity as floor nurses, i.e. in providing patient care*, LPNs and RNs perform similar functions, the record is undisputed that RNs have additional responsibilities which include the authority to "write up" LPNs for infractions. In any event, such an argument appears to be yet another invitation to revisit the issue of the supervisory status of the LPNs, which I decline to accept.

<sup>29</sup> In my view, the fact that the LPNs apparently have not, to date, been required to perform such newly-assigned duties does not alter the conclusion that such duties were assigned in violation of Section 8(a)(1) and (3) of the Act.

6. By altering the duties of its licensed practical nurses by requiring them to complete employee evaluations of, to monitor the performance of and discipline its certified nursing assistants, on or about January 31 and March 25, 2011, in an attempt to convert the licensed practical nurses into supervisors within the meaning of Section 2(11) of the Act in order to prevent them from obtaining union representation, Respondent violated Section 8(a)(1) and (3) of the Act.

7. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent should also be required to rescind and give no further effect to the new duties announced and assigned to its licensed practical nurses on January 31 and March 25, 2011.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>30</sup>

#### ORDER

The Respondent, New Vista Nursing and Rehabilitation LLC, Newark, New Jersey, its officers, agents and representatives shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities and sympathies.

(b) Creating an impression among its employees that their union activities are under surveillance.

(c) Soliciting employee complaints and grievances and promising employees increased benefits and improved terms and conditions of employment to encourage them to refrain from union organizational activities.

(d) Altering the duties of its licensed practical nurses by requiring them to complete employee evaluations of, to monitor the performance of and discipline its certified nursing assistants in an attempt to convert the licensed practical nurses into supervisors within the meaning of Section 2(11) of the Act in order to prevent them from obtaining union representation.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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<sup>30</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.



(a) Rescind and give no further effect to the new duties announced and assigned to its licensed practical nurses on January 31 and March 25, 2011.

(b) Within 14 days after service by the Region, post at its facility in Newark, New Jersey copies of the attached notice marked "Appendix."<sup>31</sup> Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet and/or by other electronic means if Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 31, 2011.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 21, 2011.

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Mindy E. Landow  
Administrative Law Judge

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<sup>31</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT coercively interrogate you about your union activities and sympathies.

WE WILL NOT create an impression that your union activities are under surveillance.

WE WILL NOT solicit employee complaints and grievances and promise you increased benefits and improved terms and conditions of employment to encourage you to refrain from union organizational activities.

WE WILL NOT alter the duties of our licensed practical nurses by requiring them to complete employee evaluations of, to monitor the performance of and discipline our certified nursing assistants in an attempt to convert the licensed practical nurses into supervisors within the meaning of the Act in order to prevent them from obtaining union representation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind and give no further effect to the new duties assigned to our licensed practical nurses on January 31 and March 25, 2011, insofar as such duties require the licensed practical nurses to complete employee evaluations of, to monitor the performance of and discipline certified nursing assistants.

New Vista Nursing and Rehabilitation, LLC

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

20 Washington Place, 5th Floor

Newark, New Jersey 07102-3110

Hours: 8:30 a.m. to 5 p.m.

973-645-2100.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784